No. 87-1924

(3)

In The
Supreme Court of the United States
October Term, 1987

RICHARD E. WILMSHURST, and
49ER CHEVROLET, INC.,

Petitioners,

v.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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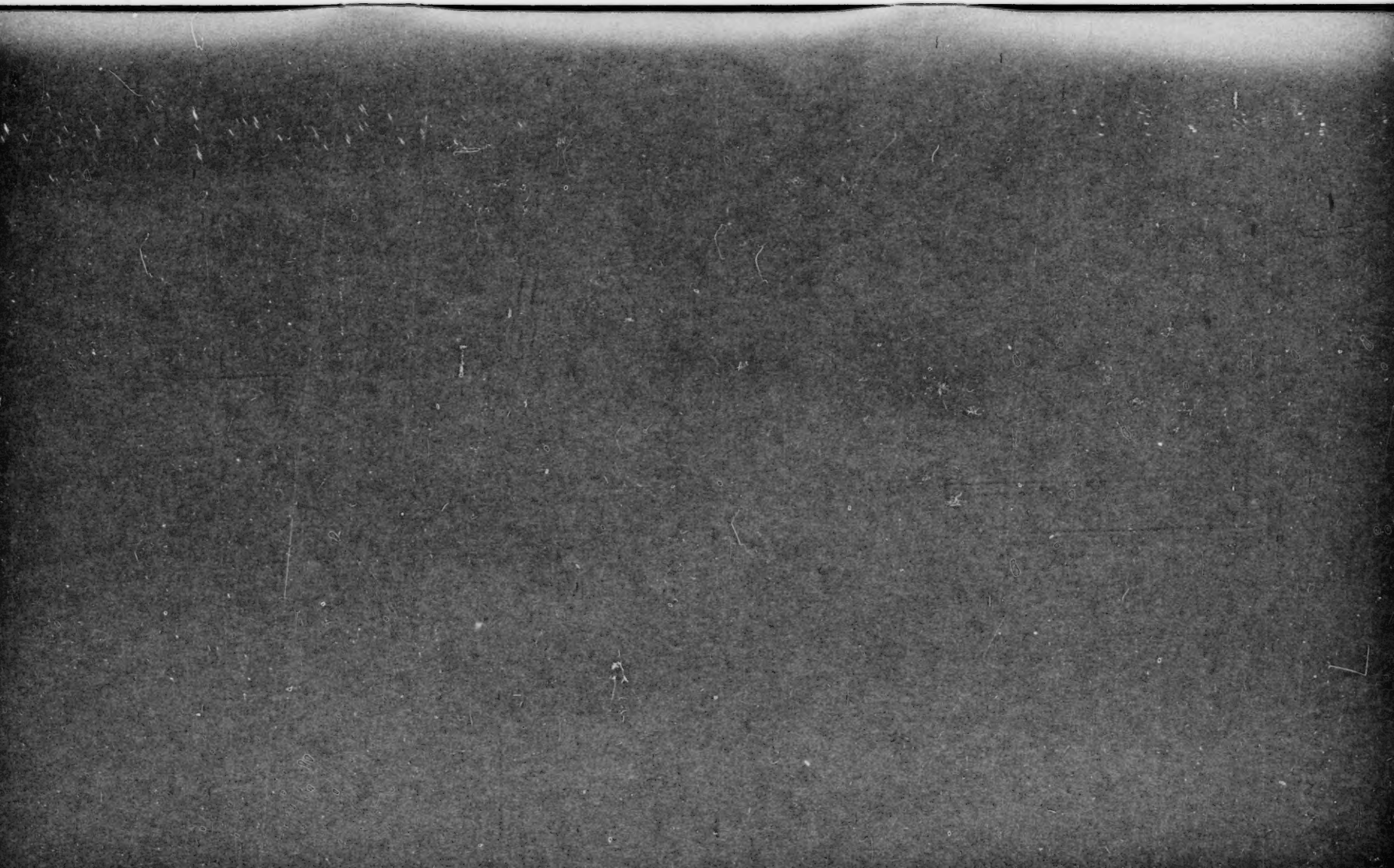

QUESTION PRESENTED

Do the "special and compelling reasons" required for the granting of review or a writ of certiorari (Sup. Ct. R. 17.1) exist here, where (a) the district court dismissed petitioners' case under Fed. R. Civ. P. 41(b) because petitioners (collectively "49er") failed to prosecute their case for three and one-half years while litigating their claims in other forums and (b) the court of appeals affirmed the judgment of dismissal simply on the ground that the district court did not clearly abuse its discretion?

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STATEMENT OF THE CASE

This is the fourth time 49er has asked this Court to overturn adverse decisions respecting its claims against respondent ("Chevrolet"). Those claims have spawned more than 20 decisions against 49er by the California New Motor Vehicle Board (the "NMVB"), the California courts and the federal courts.[1]

1. Decisions have been rendered against 49er in:

— two administrative proceedings before California's New Motor Vehicle Board (Nos. PR-348-81 and PR-510-83);

(Continued on following page)

49er's complaint in this case was filed on October 30, 1980. In it, 49er alleged that Chevrolet had violated the federal Dealer Day in Court Act ("DDICA"), 15 U.S.C. § 1221 *et seq.* by (1) threatening 49er with nonrenewal of 49er's Chevrolet franchise in retaliation for 49er's complaints about Chevrolet's policies concerning dealer warranty and parts pricing, which allegedly involved "price-fixing," and (2) by trying to coerce 49er into accepting those supposedly illegal policies. (CR 1)[2]

In September 1981, Chevrolet notified 49er that because 49er had virtually stopped selling Chevrolet's prod-

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- four superior court proceedings (San Francisco Superior Court No. 777974, Sacramento Superior Court No. 317790, Calaveras County Superior Court No. 12445, Calaveras County Superior Court No. 11169);
- five appeals to California's district courts of appeal (Civil No. A015529, 3 Civil Nos. 24309, 24893, 23426 and 243091);
- two federal court proceedings, one in the United States District Court for the Eastern District of California (No. 80-861-PCW), and the other in the United States District Court for the Southern District of California (No. 82-1363-T);
- two appeals to the Ninth Circuit Court of Appeals (No. 85-5966 and No. 86-1739);
- three petitions for certiorari (including this one) and one appeal to this Court (Nos. 83-1195, 86-1317 and 85-534);
- various writ petitions in the California Courts of Appeal and the California Supreme Court.

We describe in the text only those proceedings and decisions which bear most directly on the decision of the court of appeals which 49er attacks in the present petition.

2. In addition to citations to the Petition ("Pet.") and its Appendices ("App."), documents are cited by their docket numbers in the Clerk's Record ("CR").

ucts and had engaged in a course of conduct making continuation of the business relationship impossible, Chevrolet would cease doing business with 49er as of November 30, 1981. 49er had done nothing to prosecute its DDICA case during the year that action had been on file, nor did it begin to prosecute the DDICA case when it received Chevrolet's notice. Instead, 49er protested Chevrolet's notice to the NMVB.

The NMVB held an adjudicatory hearing and—in a decision issued December 11, 1981—rejected 49er's protest and found that Chevrolet had "good cause" for its action. (CR 44, Ex. 7, pp. 16-18) Specifically, the NMVB found: (1) that the conduct of 49er's owner, Richard Wilmshurst ("Wilmshurst"), toward Chevrolet's employees had been "unjustified and inexcusable" and had "effectively precluded the rebuilding of any viable business relationship between 49er and Chevrolet personnel," (2) that the amount of Chevrolet business transacted by 49er "was inadequate as compared to the business available to 49er," and (3) that 49er's permanent investment in the franchise was "primarily being utilized for the promotion of new Subaru vehicles and used cars rather than Chevrolet products." (CR 44, Ex. 7, pp. 15-18)

Its administrative remedies exhausted, 49er turned for the first—and only—time to the district court below. It asked the district court to enter a temporary restraining order and a preliminary injunction which would have required Chevrolet to continue to treat 49er as a franchisee, despite the NMVB decision in Chevrolets favor. (CR 5) The district court denied the temporary restraining order on December 19, 1981 and denied the motion for preliminary injunction on March 8, 1982. (CR 23)

49er took no further action of any kind in the district court. Instead, it took the claims it had made in the DDICA action to other courts, both state and federal.

Specifically:

1. 49er filed an action in the Calaveras County Superior Court to overturn the NMVB's final administrative decision. In that action, as in the DDICA action, 49er claimed that Chevrolet had coerced 49er into warranty and parts "price-fixing" while 49er was a Chevrolet dealer, and it claimed that Chevrolet had terminated it in retaliation for its complaints about that alleged wrongdoing. The superior court, after independently reviewing the record and applying its independent judgment, rejected that claim; it found instead that 49er's Chevrolet sales had been "inadequate" and that 49er's Wilmhurst had engaged in "unjustified and inexcusable" conduct. (CR 44, Ex. 12) 49er appealed, and the court of appeal affirmed, finding 49er's retaliatory termination claim "meritless" and agreeing that the conduct of 49er's Wilmshurst had been "unjustified and inexcusable." (CR 44, Ex. 13) The California Supreme Court and this Court declined to review the matter further. *Wilmshurst et al. v. New Motor Vehicle Board et al.*, 474 U.S. 936 (1985) (certiorari denied where purported appeal treated as petition for writ of certiorari).

2. In October 1982, 49er filed another federal court action against Chevrolet, this time a class action in the Southern District of California. 49er claimed in that action, as it had in the DDICA action, that Chevrolet's warranty and parts pricing policies applicable to 49er constituted illegal "price-fixing." *49er Chevrolet, Inc. v. General Motors Corp.*, 803 F.2d 1463, 1465-68 (9th Cir. 1986).

The district court granted Chevrolet's motion for summary judgment. (CR 44, Ex. 16) 49er appealed, and the Ninth Circuit affirmed that judgment. *49er Chevrolet*, 803 F.2d at 1465-68. This Court declined to review the matter further. *49er Chevrolet, Inc. v. General Motors Corp.*, — U.S. —, 107 S. Ct. 1606 (1986) (petition for writ of certiorari denied).

3. In February 1984, when 49er continued to hold itself out as a Chevrolet dealer, Chevrolet sought a preliminary injunction in the Calaveras County Superior Court to prevent 49er from using Chevrolet's registered trademarks, trade names and service marks. 49er, in turn, filed a cross-complaint for damages, charging yet again that 49er had been the victim of a retaliatory termination and coerced warranty and parts "price-fixing." (Ninth Circuit Brief of Appellee, App. A) The superior court granted the preliminary injunction, and it dismissed the cross-complaint on Chevrolet's demurrers. (*Id.*) 49er appealed, and the court of appeal not only affirmed the superior court, but levied sanctions against 49er for filing a frivolous appeal. (*Id.*) The California Supreme Court declined to review that matter further.

Finally, on December 12, 1985—after more than three and one-half years of inactivity in the district court below and after 49er's claims had been rejected repeatedly in the other litigation discussed above--Chevrolet moved the district court for dismissal of the DDICA case for failure to prosecute and for summary judgment. (CR 42) Following a hearing, the district court granted Chevrolet's motion to dismiss, stating that "[f]or a period of three and a half years . . . plaintiffs have taken no action in

this case." (CR 49) The district court also stated that "plaintiffs at this time are clearly precluded from obtaining the injunctive relief they sought and may very well be precluded from obtaining damages because of related litigation decided adversely to them in state administrative and court proceedings and in another federal court." (*Id.*) In addition, the district court concluded that the need to rule on Chevrolet's summary judgment motion was obviated by the dismissal ruling.

The Court of Appeals for the Ninth Circuit agreed. It affirmed the judgment for Chevrolet in an unpublished opinion. (App. A1-A5) It rejected 49er's proffered excuse for its failure to prosecute—that it had to exhaust its state administrative remedies—first, because there was no exhaustion requirement, and second, because "[t]he district court never had the opportunity to decide whether state administrative remedies should be exhausted . . . because 49er never asked the court for a stay or any ruling on the issue." (*Id.* at A4) Additionally, the court of appeals considered the fact that 49er had apparently "already had at least two bites of the apple" to be another reason why the district court did not abuse its discretion. (*Id.*) 49er's petitions for rehearing and rehearing *en banc* were denied. (App. B1)

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SUMMARY OF ARGUMENT

49er fails to show any "special and important reasons" to grant the writ. (Sup. Ct. R. 17.1) Nowhere does the petition demonstrate that any legal standard employed

in the decision below conflicts with any standard employed by any other circuit court or by this Court. Nor does the petition describe any important question of federal law which has not been, but should be, settled by this Court. Indeed, the petition does not identify any way in which the unpublished opinion below will affect federal court jurisprudence in any respect at all.

In addition, the court of appeals was correct in its conclusion that the district court did not clearly abuse its discretion by dismissing 49er's case under Fed. R. Civ. P. 41(b) where, as here, 49er did nothing to prosecute its case for more than three and one-half years while it was prosecuting its claims in other courts.

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REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT

49er claims that (1) 49er was in a "Catch 22 situation" because it had to file its DDICA action in October, 1980 or its pre-termination damage claims for Chevrolet's alleged coerced "price-fixing" would have been time-barred; (2) the court of appeals' decision penalizes it for having filed its DDICA action then; and (3) that result is contrary to this Court's decisions in *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), and *United States v. Michigan National Corp.*, 419 U.S. 1 (1974). (Pet. 6-9)

The argument is specious from start to finish. Neither the court of appeals nor the district court "penalized" 49er for filing its DDICA case when it did. They simply held that once 49er filed the case it had a duty to prosecute it diligently, absent a ruling from the district court relieving it of that duty. That is what Rule 41(b) says. That is what this Court has said. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

49er's complaint about being in a "Catch 22 situation" is opaque. If 49er intends to suggest that it was not feasible for it to prosecute its damage claims in the DDICA case until it had finished trying to overturn the NMVB decision, the record puts the lie to that suggestion. It shows that during 49er's more than three years of inactivity in the district court below 49er *did* press its damage claims, but in other proceedings—*i.e.*, in its superior court cross-complaint seeking damages for alleged retaliatory termination and pre-termination coercive "price-fixing"; and in its federal court class action seeking treble damages for alleged pre-termination coercive "price-fixing." The record shows that 49er simply made a tactical decision, after the district court denied its motion for a preliminary injunction, to forum-shop and litigate its claims elsewhere.

There is nothing in *Orrin Fox* or *Michigan National* to insulate 49er from the consequences of that decision. Indeed, neither *Orrin Fox* nor *Michigan National* say anything about the issue which the court of appeal decided—*i.e.*, whether the district court's judgment of dismissal under Rule 41(b) was an abuse of discretion. In *Orrin Fox* the only issue was the constitutionality of California state

law governing dealer terminations; no federal statutory or procedural issues were raised or decided. In *Michigan National,* the only issue was whether the district court had erred in dismissing, instead of staying, an antitrust case which the government had brought prematurely; there was no failure to prosecute, and thus no Rule 41(b) issue was raised or decided. There is no conflict at all between these decisions and the decision of the court of appeals.

II.

THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH PRIOR DECISIONS OF ANY OTHER COURT

49er does not pretend that the decision of the court of appeals conflicts with any decision of any other circuit court. 49er claims, however, that this Court should grant its petition because the decision conflicts with prior Ninth Circuit decisions in *Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498 (9th Cir. 1987), and *Morrison-Knudsen Co., Inc. v. CHG International, Inc.*, 811 F.2d 1209 (9th Cir. 1987). This claim is meritless, too.

First, an intra-circuit conflict—even where one exists—is not the kind of conflict this Court resolves. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Rather, such conflicts are left to the court of appeals itself. Second, the Ninth Circuit has already determined that there is no intra-circuit conflict here. 49er made exactly that contention when it sought a rehearing and rehearing *en banc* and the Ninth Circuit rejected it.

The Ninth Circuit was clearly correct because both *Hamilton* and *Morrison-Knudsen* are easily distinguish-

able from this case. In *Hamilton,* the plaintiff was ambushed. The district court in that case, acting *sua sponte* and without notice or hearing, dismissed the case under Rule 41(b) when plaintiff requested a trial delay to obtain new counsel; the Ninth Circuit reversed the dismissal because of those peculiar circumstances. 811 F.2d at 500. Nothing of that kind happened in this case. To the contrary, the district court dismissed 49er's action below only after (1) Chevrolet noticed a motion for dismissal and documented 49er's abandonment of its DDICA case in favor of litigating in other forums (CR 42), (2) 49er filed a written opposition to the motion (CR 46), (3) the matter was argued orally, and (4) 49er was given a chance to make a post-argument written submission. 49er's problem below was not that it was ambushed; it was that a Rule 41(b) dismissal was fully justified.

In *Morrison-Knudsen,* the Ninth Circuit held that a district court can, in the exercise of its discretion, require a plaintiff to exhaust administrative remedies where there is no explicit statutory requirement of exhaustion. 811 F.2d at 1223. That holding is completely irrelevant to this case. As the Ninth Circuit indicated below, whether the district court would have exercised its discretion to stay the action while 49er litigated elsewhere is entirely speculative because 49er "never asked the court for a stay or any ruling on the issue." (App. A4) Nothing in *Morrison-Knudsen* suggests that a *plaintiff* can stay its action by self-help.[3]

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3. 49er's statement to this Court that "The [district] court was aware that 49er and GM were involved in New Motor Vehicle

(Continued on following page)

III.

THE COURT OF APPEALS' DECISION DOES NOT INVOLVE ANY IMPORTANT ISSUE OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Finally, 49er claims that "*stare decisis*" requires the Court to decide whether automobile dealers must or can exhaust their state administrative remedies before prosecuting their DDICA cases. (Pet. 11-14) There is nothing to this claim either.

In the first place, 49er asks the Court to render an advisory opinion. The record shows that 49er was not exhausting its administrative remedies during the three and one-half years that it let its DDICA case sleep. The administrative process was concluded, as a matter of law, on December 11, 1981, when the Board rendered its decision denying 49er's protest. Cal. Veh. Code § 3067. Even if 49er's superior court action to overturn that decision were treated as an attempt to exhaust administrative remedies, 49er's superior court counterclaim for damages and its federal court class action for treble damages were plainly no such thing.

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Board hearings and it appeared the court was following the doctrine of the exhaustion of administrative remedies" (Pet. 10, note 2) is at best disingenuous. When 49er moved for a temporary restraining order and preliminary injunction, the NMVB hearings were concluded and the NMVB had ruled against 49er. The district court knew that because *Chevrolet* told the court that. As 49er admitted at oral argument, *49er* never advised the district court that it was engaging in any of the subsequent litigation which is described in the text above. Thus, there was no basis whatever for 49er to infer that the court had implicitly stayed the action while 49er pursued its other lawsuits.

Additionally, there is no need for this Court to decide whether automobile dealers must exhaust state administrative remedies before prosecuting DDICA cases. The Court has already articulated the legal principle which answers that question. As the court of appeals stated, the Court has held that one who is entitled to judicial relief under a federal statute is not required to exhaust administrative remedies unless the federal statute so prescribes. (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50 & 51 (1938)), and neither the DDICA nor its legislative history contain any such provision. (App. A4)

Neither is there any need for this Court to make clear, as 49er seems to urge (Pet. 9-11), that automobile dealers *can* exhaust their administrative remedies where the district court decides that makes sense. The court of appeals specifically acknowledged that "it is within the district court's discretion" to enter such an order, even where there is no statutory exhaustion requirement. (App. A3 &A4) 49er points to no conflict among the circuits about this discretionary principle, and we are aware of none. Thus, the law is already clear that dealers can proceed in that fashion when permitted to do so by the district court.

There is certainly no need for this Court's guidance as to whether an automobile dealer can do what 49er did here. The most basic precepts of sound judicial administration—and common sense—teach that a dealer cannot file a DDICA action and then, without any court sanction whatever, simply let it languish for more than three and one-half years while litigating the same claims in other courts.

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CONCLUSION

The petition should be denied.

Dated: May 27, 1988.

Respectfully submitted,

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APPENDIX A

LIST OF RELATED ENTITIES PURSUANT TO SUPREME COURT RULE 28.1

Pursuant to Supreme Court Rule 28.1 the following information is provided by General Motors Corporation.

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